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ABSTRACT

Some children with disabilities suffer losses of social, behavioral, communication, or academic skills during breaks in instruction and may need an extended school year (ESY) program in order to ensure that they receive the "appropriate public education" that is federally mandated. This guide addresses the legal basis for ESY programs, court decisions which apply to ESY, definitions, who must be considered for ESY, when ESY is not an appropriate decision, how ESY is structured, ESY in year-round schools, notice requirements that apply to ESY, and due process procedures. Factors to be considered in making ESY decisions are discussed, including regression-recoupment rates; motor, communication, or social skill levels; criterion-referenced and standardized test data; least restrictive environment considerations; behavioral needs; physical, mental, emotional, or health factors; past history; data-based observations of performance; teacher interviews and recommendations; parental input; critical learning stages; and parental skills and abilities. (JDD)

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AZ-TAS
Themes & Issues

A Series of Topical Papers on Special Education

Extended School Year

Arizona Department of Education
Special Education

Arizona Department of Education
C. Diane Bishop, State Superintendent of Public Instruction
September 1993

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EXTENDED SCHOOL YEAR

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EXTENDED SCHOOL YEAR

THE LEGAL BASIS FOR EXTENDED SCHOOL YEAR

The Appropriateness Problem:

When Congress passed the Education of the Handicapped Act (EHA) as P.L. 94-142 in 1975, it required states to provide all handicapped children with a "free appropriate public education" (FAPE). This law, which was recently reauthorized as the Individuals with Disabilities Education Act (IDEA) has made educators increasingly aware that many children with disabilities cannot receive an appropriate education if they do not receive some type of extended school year program (ESY). The reasons why ESY may be needed vary from child to child, but the end result is that some children may suffer severe losses of social, behavioral, communication, or academic skills during breaks in instruction. This is particularly true during the summer vacation period. The losses suffered by some children take an unreasonable amount of time for the student to recoup when school begins. Other students may suffer losses because they reach critical learning stages at the end of a school year and need ESY in order to avoid irreparable loss of a learning opportunity. Although rare, there are other students who may not fit into either of these groups, but whose unique needs make them legitimate candidates for ESY. Schools should have procedures in place that allow for flexibility in considering each child's needs.

The Requirements Of The Individuals With Disabilities Education Act (IDEA):

The legal requirements for ESY arise out of the IDEA, which is an affirmative action law which focuses on locating and providing individualized education services to children with disabilities. It also requires the education programs to be appropriate for the individual child. Special education programs must meet several requirements. In addition to being specifically designed for the individual child, the programs and services must be provided in a setting that is the least restrictive environment (LRE) for that child, and must, to the maximum extent appropriate for the child, allow for interaction with non-disabled peers. The first two of these requirements support ESY. First, a program specifically designed to meet a child's needs cannot be automatically restricted to the standard number of school days per year. Such a limitation precludes the development of an education program that is truly individualized. Second, for many children with severe disabilities, it is not possible to maintain placement in the LRE for a child without ESY. The child's skill level or behavior may deteriorate significantly over summer break, or over other extended breaks in instruction, to the point where an inordinate amount of time must be spent relearning those behavior controls or other skills when instruction is resumed. Consequently, the amount of time available to learn new skills is severely reduced. IDEA prohibits schools from restricting special education programs and services to certain categories of students. For example, ESY services cannot be available to students with severe mental retardation, but not to students with learning disabilities. Conversely, it is not permissible to place students in ESY based upon their categorical diagnosis without considering the need for, and effects of, that decision.

WHAT COURT DECISIONS APPLY TO ESY?

Since 1974, many court cases have addressed various issues related to the IDEA, but only a few have been decided by the United States Supreme Court. The most significant of these is Board of Education of the Hendrick Hudson Central School District v. Rowley ("Rowley"), 458 U.S. 176 (1982), which determined that, under the EHA, an "appropriate" education must:

a. be provided at public expense and under public supervision,

b. approximate the grade levels used in the State's regular education,

c. meet the State's educational standards, and

d. comport with the child's Individualized Education Program (IEP).

The Rowley Analysis: If special education, defined by Rowley as specially designed instruction, plus any necessary related services, defined in 34 CFR 300.16 as "...transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education..." result in the child being able to benefit from the instruction, and the other items on the above list are met, the child is receiving a free, appropriate, public education as required by IDEA. The Court made it clear that the standard is educational "benefit," and does not require that the "best possible" education must be provided.

Subsequent to Rowley, the issue of lengthening the school year for children with disabilities arose in the context of evaluating the appropriateness of an educational program that did not allow for extended school year instruction in certain cases. It became apparent that some students were either unable to relearn skills that were lost over the summer vacation period, or took an unreasonable amount of instructional time relearning skills/behaviors that were taught the previous school year. In some cases, the lost skills were replaced by other inappropriate skills or behaviors.

It is possible to identify most students who would require an extended school year by looking for the existence of regression-recoupment of skills. There are other standards which may be used to determine the need for ESY. The standard used should always be based on the needs of an individual student. These are discussed under the heading, "How Should Placement Decisions Be Made?" It was this statutory and caselaw framework which formed the basis for subsequent federal decisions which barred an absolute limit on the number of days per year that a district would provide services to children with disabilities.

Special Education Programs Cannot Be Limited To The Length Of A Regular School Year And Self-Sufficiency Is Not The Only Appropriate Goal Of ESY.

The initial federal court cases involving ESY were Armstrong v. Kline, 476 F.Supp. 583 (E.D. Pa. 1979) and its companion appellate case, Battle v. Commonwealth, 629 F2d 269 (3d Cir. 1980). The Armstrong court held that Pennsylvania's policy of limiting instruction to 180 days per year, although "seemingly neutral", acted to deprive children with disabilities of educational programs truly based on their individual needs. This opinion was echoed in Yaris v. Special School District of St. Louis County, 728 F.2d.1055 (8th Cir. 1984), when the 8th Circuit Court found that Missouri's policy of limiting programs for children with severe disabilities to 180 days violated the IDEA, as well as the Rowley requirement that each child be provided with an individually designed educational program. Battle agreed with the 180 day determination, but rejected the Armstrong court's position that the ultimate goal of ESY was to maximize self-sufficiency. In the language of the Court:

> "Certainly all of this language [in the federal statutes], including that which expresses a concern for increased self-sufficiency, should provide guidance in the formulation of education goals. We believe, however, that the district court was premature in attempting to formulate educational policy...in the face of the Act's deference to state educational decision making."

It is important to emphasize that even the Armstrong court admitted that "maximizing self-sufficiency" was not the only permissible goal of extended school year programs. The Court stated:

> "By enunciating this standard [of maximizing self-sufficiency], the Court does not mean to imply that it is the only one that is used to evaluate whether a program is 'appropriate' and meets the 'unique needs' of the handicapped child. Of course, Congress may have had other goals that it wished the educational program to satisfy, ... which may be considered in determining whether a program meets the unique needs of the handicapped child. In this case, as the 180 day rule prevents plaintiffs...from attaining that level of self-sufficiency that they could otherwise achieve given their handicap, there is no need to discuss other goals and standards by which an educational program is to be judged." (Armstrong v. Kline, at footnote 8)

Accordingly, districts should not establish policies which exclude students whose needs may require ESY for reasons other than self-sufficiency, and who will be severely impacted by an extended break in instruction. As mentioned above, it is important to understand that nothing in Arizona law or IDEA requires districts to maximize the student's potential, or provide the best education possible. The requirement is that special education, plus any required related services, are to be provided to help the child benefit from the education provided. Exactly what

constitutes a benefit will depend on the individual child, but the Rowley opinion suggests that the ability to make progress is a basic measure for most children. This does not always mean forward progress, because for some children, progress may be the maintenance of existing skills or the slowing of unavoidable regression.

While neither Armstrong nor Battle is binding upon Arizona, these cases have set precedent for other circuits, including Arizona's 9th Circuit Court, which has yet to decide a similar case. There is a strong judicial reluctance to interfere in educational policy making. Most courts since Rowley have deferred to education officials when policy matters are considered. However, the courts have made it clear that the IDEA requires that a student's educational program is based on individual needs and not determined by what programs are readily available within the district.

DEFINITIONS

The following definitions are related to Extended School Year. Appropriate references are made to specific State statutes or regulations, from which some of the definitions have been taken. Additional information and examples may be found in other sections.

Critical learning stage: When a student has mastered a concept in one setting and is ready to generalize what has been learned so that it can be applied in other situations. If the student is unlikely to relearn the skills or information, or have another opportunity to generalize them to other situations, ESY should be considered to avoid irreparable loss of the learning opportunity.

Extended School Year (ESY): An individualized program, based on those goals and objectives on the IEP of the year preceding ESY, offered to special education students during all or part of an extended vacation period. ESY extends instruction beyond the conventional or mandatory number of instructional days in a school year. In Arizona, the conventional school year is currently 175 days. The goal of ESY is to assist children with disabilities with the maintenance or critical generalization of specific IEP objectives learned the year preceding the ESY, including those related to self-sufficiency, behavior, socialization, communication, and academics.

Individualized Education Program (IEP): A "...written statement for providing special education services to a child with a disability that includes the pupil's present levels of educational performance, the annual goals and the short-term measurable objectives for evaluating progress toward those goals and the specific special education and related services to be provided." [ARS 15-761(9)] In addition, the IEP should include the amount of time to be provided in each area of instruction or related service and the anticipated length of time that the services will be provided. The IEP must be reviewed at least once annually to monitor the student's progress and to assess the appropriateness of the student's educational program. The detailed components of the IEP are specified in Arizona Administrative Code (AAC) R7-2-401.

Multidisiplinary evaluation team: A "...team of persons, including at least one teacher or other specialist with knowledge in the area of the suspected disability, that determines whether a child is eligible for special education based on evaluation results." [ARS 15-761(14)]

Parent: The "...natural or adoptive parent of a child, the legal guardian of a child, a relative with whom the child lives and who is acting as the parent of that child, a surrogate parent who has been appointed for a child pursuant to ARS 15-763.01 or a person who has a power of attorney to act on behalf of the natural or adoptive parent of a child in educational decisions. Parent does not mean this

state if the child is a ward of the state." [ARS 15-761(20)]

Recoupment: The amount of time required to relearn skills listed on the IEP following an extended break in instruction.

Regression: Reversion to a lower level of functioning in those skills or behaviors specified on the student's IEP, which results from an extended break in instruction.

Regression-Recoupment Problem: When the amount of time required to relearn skills or behaviors becomes so significant as to interfere with ongoing educational progress. Since most students experience some regression over extended breaks, a significant increase in the recoupment period must exist in order for a student to be considered in need of ESY services. When considering regression-recoupment problems, districts should have procedures in place which address what is a reasonable amount of regression and rate of recoupment for the district's particular population. This will provide a standard against which an individual child's progress can be measured.

Self-Sufficiency: The acquisition of basic life skills that aid in the child's ability to function as independently as possible. The goal of self-sufficiency is to reduce the child's reliance on caretakers or other institutionalized care. Self-sufficiency goals may be the goals that are most likely to require ESY for maintenance and critical generalization, but other goals from the current IEP may be appropriately addressed during ESY. (See the section entitled "How Should ESY Decisions Be Made?")

Summer School: Enrichment or remedial courses offered to students, which may include children with disabilities, for which tuition may be charged. These courses are typically in contrast to the materials taught during ESY services, where the goal is to allow for critical generalization of skills and to maintain current levels of functioning.

WHO MUST BE CONSIDERED FOR ESY?

All children with disabilities, as defined in 34 CFR 300.7 and ARS 15-761, must be considered for ESY, but only those who will be severely impacted by an extended break in instruction should be enrolled. As addressed above in the section entitled, "The Legal Basis for ESY", the provisions of IDEA require school districts to provide ESY services for those children with disabilities who require such services to ensure an appropriate educational program.

School districts may not automatically or categorically exclude, or include, any group. Rather, the decision must be made according to the individual needs of the child. The determination for eligibility must be made annually. It should not be automatically assumed that a child who receives ESY will be eligible the following year, although it is one factor to consider when making the decision.

HOW SHOULD ESY DECISIONS BE MADE?

There are many factors which may be utilized by a school district in making decisions about the need for ESY. While an analysis of regression-recoupment will identify most of the students needing ESY, districts should always allow for exceptions. Otherwise, they will not be able to consider each student's individual needs as required by IDEA.

The goals on the IEP for the school year preceding ESY should be evaluated before an ESY decision is made. Some of the Basic Self-Help Skills to be considered for eligibility are:

a. Mobility and muscular control: sitting, standing, locomotion, ambulation with aids, and orientation to physical surroundings.

b. Toileting: indication of need to toilet, urinating or defecating in toilet, and appropriate toileting skills, e.g. wiping, flushing, handwashing.

c. Feeding and eating: feeding self, using utensils, drinking from a cup or glass.

d. Dressing: putting on or removing simple clothing.

e. Communication: receptive language skills, expressive language skills.

f. Academics: reading, writing, math, including recognition of numbers and letters.

Some other Basic Community Living Skills to be considered may include impulse control, the development of stable relationships, and appropriate interaction with peers and adults.

Problems in these areas might include:

a. Aggressive behavior which threatens the physical well-being of the student or others, or which damages property.

b. Communication difficulties resulting in grossly impaired or absent verbal communication skills, or bizarre speech.

c. Unusual or repetitive habits including self-stimulation, fetishes or attachments to odd objects, which seriously interfere with learning.

d. Withdrawal or inattentive behavior including extreme withdrawal, lack of awareness of what is happening in the immediate surroundings and demonstration of behavior not related to the situation.

e. Extreme disruption of relationships with others including extreme indifference or aversion to affection, inability to communicate basic needs, extremely

inappropriate or bizarre relations or communication with others, and continuing to engage in behavior that is no longer appropriate.

f. Extreme reactions to the environment such as severe anxiety reactions or catastrophic reactions to changes in the environment, and extremely inappropriate reactions to environmental clues, such as inappropriate use of common objects and inappropriate responses to simple verbal or nonverbal cues or symbols.

Students Cannot Be Required To Fail To Prove Need For Extended School Year

Districts should be aware that a student cannot be required to fail, or go for an entire year without ESY, simply to prove need. If empirical data is not available to support the need for services, then other factors must be considered in making the decision. Guidance is provided by ARS 15-881, as well as through this technical assistance document.

The factors to be considered in making ESY decisions shall include, but are not limited to, those on the following list. However, it is not necessary for schools to include documentation on every factor for each child with a disability. Only those factors which apply to a particular child, and on which the IEP Team relies in making its decision, should be identified.

a. Regression-recoupment rates, as evidenced by past performance, including previous summer breaks, Christmas or mid-winter vacation breaks, or even shorter periods of time, such as weekends or short holidays. Districts should have general guidelines for determining what constitutes a regression-recoupment problem. This may be in the form of a broad statement or numerical guidelines. (See the "Definitions" section for additional information on regression, recoupment, and regression-recoupment problem,, including general guidelines.) Data collection should include, but not be limited to: evaluating parental and teacher input, test results, performance data and other evidence of progress on targeted goals and objectives.

b. Motor, communication, or social skill levels, and a critical need for continuity in order to maintain those skills.

Example: Sara Smith is a student with severe mental retardation (SMR) at Desert Elementary School. During the past summer, Sara experienced severe regression in her ability to communicate with others. Instruction resumed in August, but Sara did not recoup her communication skills until November 15. Based upon these factors, Sara should be considered for ESY services in relationship to goals and objectives on communication.

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c. Criterion-referenced and standardized test data, including pretest/posttest information.

Example: John's classroom teacher and speech pathologist kept data on his communication progress throughout the previous school year. They then documented his progress on the objectives that had to be repeated after summer vacation, and discovered that John was unable to begin work on any new communication objectives until November 15. This information played a critical role in the determination to provide John with ESY program services the following summer.

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d. Least restrictive environment (LRE) considerations, when ESY is determined to be necessary in order for student to maintain placement in least restrictive environment during the regular school year. (See the example below.) ESY services may not be subject to the same least restrictive environment considerations as during the regular school year. First, the same LRE options may not be available, and second, for some students, the appropriate LRE may be at home with other members of the family with only a very limited ESY.

e. Behavioral needs, particularly the need for highly structured programming to maintain behavioral controls established during the previous school year.

Example: Gina Carter is a 15 year-old student in a program for students with emotional disabilities at Washington High School. During the review of her IEP, the Team determined that, although her academic regression over summer vacation would not be significant, the loss of behavior control would be severe, if not permanent. The Team also considered Gina's placement in the school program, and determined that, without ESY, it is likely that Gina would have to be placed in a more restrictive environment (i.e., a residential placement) for most of the following school year. Therefore, ESY would be necessary in order for her to remain in the least restrictive environment.

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f. Physical, mental, emotional or health factors.

Example: John Dunne is a high school student with a learning disability who was functioning at grade level in all subjects except reading. During the school year, he was involved in an automobile accident and suffered severe head injuries.

At the annual review of his IEP, the team determined that John would not be able to maintain the skills he had learned during the school year without ESY. His physical injuries were considered only to the extent that they had caused him to be unable to maintain his end-of-the-year skill level without suffering severe regression over the summer break.

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g. Past history, including evidence of past regression, or past ESY services. The determination for eligibility must be made annually. It should not be automatically assumed that a student who has received ESY services in the past will be eligible the following year, although it is one factor to consider when making the placement decision.

h. Data-based observations of performance in classroom or community-based activities.

i. Teacher interviews and recommendations, based on data-based observations, empirical test data, and parent information.

j. Parental input, including parent requests for ESY services, and consideration of parental observations of the student.

Example: John Johnson transferred to Washington High School in November. The psychologist noted that John had received ESY services the previous summer, and alerted John's teachers. The teachers documented his progress prior to winter break, and his recoupment rate after he returned to school. They also documented spring break regression-recoupment rates. The IEP Team reviewed this documentation, along with medical information from John's doctor, and information presented by John's parents at the IEP review conference. The IEP Team found that John's condition had improved significantly and, although John was likely to suffer some regression over the summer vacation period, it was not likely to take him a significant amount of time to recoup those skills. The Team recommended that John not receive ESY services.

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k. Critical learning stages, particularly those related to behaviors or skills which have not yet been generalized at the time the scheduled break is to occur. If the student is unlikely to relearn the skills or information, or have another opportunity to generalize them to other situations, ESY should be considered in order to avoid irreparable loss of the learning opportunity.

Example: Joan Ford is a 9 year-old student with multiple disabilities. Joan learned toileting skills in May, and was receiving instruction on generalizing those

skills to other situations. ESY was recommended in order that Joan continue to receive instruction during this critical learning stage so that 1) the new skills could be maintained; 2) those skills could be generalized to other situations while Joan was able and willing to perform them; and 3) the skills would not be lost and replaced with other, possibly inappropriate, behaviors.

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l. Parental skills and abilities to monitor programming and prevent regression. A parent or guardian may be unable to maintain a child's level of functioning during a break in programming. The program may be very complex, and the parents may not have either the time or expertise to continue the program at home. This factor is relevant to whether the child can be expected to regress. Where appropriate, parents may be given training to assist them in home teaching and maintenance of specific skills or behaviors.

While the skills and abilities of the parents can be considered, the parents cannot be expected to fulfill a responsibility for the school district. The school district is encouraged to work with the parents for the child's benefit, but cannot abrogate its duty to provide a free, appropriate public education to the child.

m. When ordered by a due process hearing officer, ESY shall be provided. If the District chooses to appeal, the student shall be placed in ESY pending the result of the appeals process.

WHEN IS ESY NOT AN APPROPRIATE DECISION?

The purpose of offering an extended school year is to assist students in the critical generalization or maintenance of identified skills in order to avoid severe or permanent loss of previously learned skills or behavior control. ESY was never intended to serve as the only resource available to parents and students. School districts are encouraged to assist families in utilizing community resources to meet their particular needs during periods of extended breaks. School districts must not offer ESY when it is inappropriate to do so. The following list is intended to help clarify decisions on ESY:

a. IDEA does not mandate that year round services are provided for all children with disabilities.

b. ESY is not required for the convenience of the school or parents and, therefore, cannot serve as a day care or respite care service.

c. IDEA does not require that ESY be provided in order to maximize educational opportunities for a child with a disability.

d. It is not necessary to continue instruction on all of the previous year's IEP goals and objectives during the ESY period. The focus should be on those specific goals and objectives which would be severely impacted by an extended break in instruction.

e. ESY is not compulsory. Participation in the program is discretionary with the parents, who may choose to refuse the ESY service. There may be personal and family concerns that take precedence over ESY, including the family's desire to have the student at home over an extended break.

f. ESY is not a summer recreation program.

g. ESY is not to be considered in order to help children with disabilities advance in relation to their peers.

h. ESY is not designed for those students who exhibit random regression, or regression which is solely related to medical problems resulting in degeneration, or transitional life situations such as divorce or death of a family member.

i. ESY is not subject to the same least restrictive environment considerations that apply during the regular school year.

HOW IS ESY STRUCTURED?

The IEP Team shall determine the duration, frequency, and type of services that each child shall receive during the ESY. The goals and objectives should be a continuation of all or part of the previous year's IEP, although the ESY instruction may be modified in order to enhance generalization and maintenance.

ESY instruction may not necessarily be provided in a classroom setting, as the location of service delivery can vary. For example, some students may need services provided in the home or at an alternative location.

The number of hours per day, the number of days per week, and the number of weeks that instruction is provided during the extended school year program are to be determined by the IEP Team and must be based on the child's IEP goals. It is also possible for a child to be eligible for ESY services, but the Team may recommend that services be suspended for overriding concerns, e.g., that the child's mental health concerns require a complete break from instruction. The reasons for making such a recommendation need to be described clearly on the ESY evaluation document.

As with any special education program, the needs of the student should dictate the program, rather than the available program dictating the services to be provided to the student.

ESY IN YEAR-ROUND SCHOOLS

The need for ESY services is less critical when schools operate on a year-round basis, since the breaks from instruction are shorter than the normal three-month break found in most schools.. However, some children with disabilities may require instruction during the periods between sessions used in year-round school programs in order to avoid irreparable injury or loss of a critical learning opportunity. When the child's needs require instruction during breaks, ESY must be provided. The analysis for determining eligibility and the type of ESY program to be provided is the same as that for regular ESY programs in schools which operate on a traditional calendar.

WHAT NOTICE REQUIREMENTS APPLY TO ESY?

The parents of every child who is eligible for services under the IDEA must be advised annually that an ESY program is available for those students who qualify. This notice can be mailed to parents, or given to them during IEP conferences. This does not mean that all children with disabilities will qualify for ESY, or that the parents must request ESY immediately upon receipt of the notice. However, the notice must give the parents a chance to request reconsideration if ESY is not determined to be appropriate for their child, and to exhaust administrative remedies, including those through due process, if ESY placement is not recommended by the IEP team.

The Importance Of The IEP

Since every child with a disability who is eligible for services under IDEA must be individually considered for possible ESY placement, it is expected that the IEP will play the paramount role when making these decisions. For those students who are being considered for ESY, the appropriate goals and objectives for the ESY program should be identified and made part of the current IEP. This may be done on the original IEP at the time of initial placement or annual review, or through use of an addendum.

For those students who are placed in ESY after a new IEP has been developed for the upcoming school year, an addendum to the previous year's IEP which contains the goals for the ESY program will be sufficient to place the student in ESY. Conversely, if the IEP Team believes that the student will certainly not require ESY services, this can be indicated on the IEP, thus serving to notify the parents that the student will not receive ESY. However, this will not suffice for formal written notice of the denial of services when the services have been specifically requested by the parent.

For all students, documentation should always include a description of the basis for making the decision on whether to recommend or deny ESY services.

When ESY is denied by the district after a request for these services has been made by the parent, formal written notice which meets the requirements of 34 CFR 300.504 and 300.505 must be given to the parents. The written notice must advise the parents of the denial, must provide a description of the reasons for not recommending ESY, must describe the factors considered in making the decision, and must inform the parents of their right to a due process hearing if they disagree with the decision. Mediation may also be used as a means of dispute resolution, but may not be utilized to deny or delay a parent's right to a due process hearing.

WHAT HAPPENS TO THE CHILD IF A DISPUTE ARISES?

It is important for the school district to make decisions regarding the provision of ESY for a student early enough in the school year to allow parents to be able to exhaust administrative remedies if they disagree with the decision of the IEP Team. In the event that the parent disagrees with the decision of the Team not to provide ESY services, and the district has not allowed sufficient time for the parents to dispute the decision through due process, the child should be placed in ESY pending the outcome of administrative proceedings.

Parents should be given a reasonable amount of time after being notified (e.g., 30 days) to respond to a district's decision to not provide ESY to their child. If a timely response is not received, then the public education agency is not be required to place the child in ESY pending the outcome of administrative proceedings. Of course, any such time restrictions should be reasonable and should be clearly explained or otherwise made known to the parents.

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